SQA Builders Sdn Bhd v Luxor YRM Sdn Bhd and another suit

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS WA-24C-64–04 OF 2017 AND WA-24C-82–05 OF 2017
LEE SWEE SENG J
18 OCTOBER 2017

Contract — Building contract — Adjudication of dispute under Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') — Whether the CIPAA gave adjudicator power to award reasonable rate of interest on adjudicated sum even though claimant had not pleaded for interest — Whether adjudicator entitled to form own opinion on what was fair and reasonable sum to be awarded for liquidated and ascertained damages based on evidence — Whether adjudicator was not bound to accept computations/contentions of one side or other — Whether minor errors committed by adjudicator in awarding of interest could be corrected on litigation or arbitration and did not require whole adjudication decision to be set aside so long as substance of decision was not perverse on facts and evidence — Whether commission of such minor errors did not mean adjudicator had breached rules of natural justice

Luxor YRM Sdn Bhd ('Luxor') appointed SQA Builders Sdn Bhd ('SQA') to carry out a building project. Disputes between the parties led to SQA filing a claim for payment under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). SQA's total claim was for RM1,221,504.79, including late payment interest, on certain interim payment certificates. In response, Luxor claimed it was entitled to set off RM527,850 as liquidated and ascertained damages ('LAD') against SQA's claim on the ground of SQA's delay in completing the works. Luxor also disputed SQA's calculation of interest on its claim. The adjudicator, appointed under the CIPAA, awarded SQA a total sum of RM705,087,10 which included RM66,640.94 as interest calculated until 9 November 2016 (which was the day before SQA lodged the request to appoint the adjudicator). On Luxor's application to the adjudicator to review her decision on the ground there were computational/typographical errors in it, the adjudicator reduced the interest sum down to RM62,678.92. Luxor applied to set aside the adjudication decision under s 15 of the CIPAA on the ground the adjudicator had breached the rules of natural justice and also exceeded her jurisdiction. SQA, on the other hand, applied for enforcement of the adjudication decision. In its originating summons ('OS'), Luxor contended that the adjudicator had, without inviting the parties to submit on those issues: (a) reduced the RM527,850 it had claimed for the LAD for 207 days of delay down to RM510,000 even though the claim was based on the contractual rate of RM2,550 per day; and (b) awarded interest up to 9 November 2016 although

SQA had only claimed for interest up to 6 June 2016. Luxor also contended that the adjudicator had exceeded her jurisdiction by computing interest up to 9 November 2016 when the maximum date she could compute it until was 30 September 2016 (the date SQA's payment claim was served on Luxor).

Held, dismissing Luxor's OS and allowing SQA's OS for enforcement of the adjudication decision:

(1) Whether it was a calculation or a recalculation of the LAD with respect to the interest on the amount to be set off from SQA's claim, it was a decision the adjudicator had made after hearing both sides and after having regard to the documents submitted before her. The revised adjudication decision was not in breach of natural justice. It was at Luxor's request that the adjudicator recalculated the interest on the ground there were computational errors and the errors were corrected in Luxor's favour (see paras 37–39).

(2) All that the rules of natural justice required was that an adjudicator had to hear both sides on an issue or matter in dispute. Here, it was with respect to the defence of set off and the amount that should be allowed. It did not mandate that the adjudicator had to decide in a manner the parties wanted him to decide as that would be seen to be a bias in favour of one side over the other. Here, both parties took diametrically opposite positions and the adjudicator gave her reasons why the sum of RM510,000 was justified by way of set off. After hearing both parties, the adjudicator was not bound to accept one of both positions but to arrive at a fair, reasonable and justified amount having regard to the provisions in the contract (see paras 27 & 30–31).

(3) As to the issue that the adjudicator had awarded interest up to 9 November 2016 notwithstanding SQA's claim for interest was only up to 6 June 2016, this was at most an error in calculation of interest that resulted in an insubstantial difference in the adjudicated sum. The error was not material enough to justify the setting aside of the whole adjudication decision. The adjudicator did not go on a frolic of her own. It was an error that did not affect the substance of the decision and was one that could be corrected in arbitration or litigation. There was no breach of natural justice. Even if there was such a breach, it was only of a peripheral nature and did not substantially affect the outcome of the case (see paras 44–50 & 54).

(4) Under the CIPAA, the adjudicator had jurisdiction to decide on the interest payable on the sum claimed under a payment claim whether or not it was pleaded. The fact that the adjudicator here calculated the contractual interest up until the date of notice of adjudication of 9 November 2016 instead of up to 30 September 2016 (the date the payment claim was served) was at best an error within jurisdiction and

not an error in excess of jurisdiction and certainly did not justify the setting aside of the whole adjudication decision (see paras 56 & 60).

[Bahasa Malaysia summary

Luxor YRM Sdn Bhd ('Luxor') melantik SQA Builders Sdn Bhd ('SQA') untuk menjalankan projek pembinaan. Pertikaian di antara pihak-pihak membawa kepada SQA memfailkan tuntutan untuk bayaran di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('Akta'). Jumlah tuntutan keseluruhan SQA adalah untuk RM1,221,504.79, termasuk faedah bayaran lewat, atas sijil-sijil bayaran interim tertentu. Dalam menjawab, Luxor mendakwa ia berhak untuk set off sejumlah RM527,850 sebagai ganti rugi tertentu dan ditetapkan ('LAD') terhadap tuntutan SQA atas alasan kelewatan SQA menyiapkan kerja-kerja tersebut. Luxor juga mempertikaikan pengiraan faedah SQA ke atas tuntutannya. Pengadil, yang dilantik di bawah Akta, mengawardkan SQA sejumlah RM705,087,10 yang mana termasuk RM66,640.94 sebagai faedah yang dikira sehingga 9 November 2016 (yang mana adalah hari sebelum SQA membuat permintaan untuk melantik pengadil). Atas permohonan Luxor kepada pengadil untuk menyemak keputusannya atas alasan terdapat kesilapan pengiraan/tipografi di dalamnya, pengadil mengurangkan jumlah faedah kepada RM62,678.92. Luxor memohon untuk mengenepikan keputusan penghukuman di bawah s 15 Akta atas alasan pengadil telah melanggar peraturan keadilan semula jadi dan juga telah melebihi bidang kuasanya. Sebaliknya SQA, memohon untuk penguatkuasaan keputusan penghukuman tersebut. Dalam saman pemulaannya ('SP'), Luxor berhujah bahawa pengadil telah, tanpa meminta pihak-pihak untuk berhujah atas isu-isu tersebut: (a) mengurangkan jumlah RM527,850 yang dituntutnya untuk LAD bagi lewat 207 hari kepada RM510,000 walaupun tuntutan adalah berdasarkan atas kadar kontrak sebanyak RM2,550 sehari; dan (b) mengawardkan faedah sehingga 9 November 2016 walaupun SQA hanya menuntut untuk faedah sehingga 6 Jun 2016. Luxor juga berhujah bahawa pengadil telah melebihi bidang kuasanya dengan mengira faedah hingga 9 November 2016 apabila tarikh maksimum yang dia boleh mengiranya adalah sehingga 30 September 2016 (tarikh tuntutan bayaran SQA diserahkan ke atas Luxor).

Diputuskan, menolak SP Luxor dan membenarkan SP SQA untuk penguatkuasaan keputusan penghukuman:

(1) Sama ada ia adalah pengiraan atau pengiraan semula LAD berkaitan kepada faedah atas jumlah untuk diset off daripada tuntutan SQA, ia adalah keputusan yang dibuat oleh pengadil selepas mendengar kedua-dua pihak dan selepas mengambil kira kepada dokumen-dokumen yang dimasukkan di hadapannya. Keputusan penghukuman semula adalah tidak melanggar keadilan semula jadi. Ia adalah permintaan Luxor bahawa pengadil telah mengira semula faedah

atas alasan terdapat kesilapan pengiraan dan kesilapan telah dibetulkan memihak Luxor (lihat perenggan 37–39).

(2) Kesemua peraturan keadilan semulajadi memerlukan bahawa pengadil perlu mendengar kedua-dua pihak atas isu atau perkara dalam pertikaian. Di sini, ia adalah berkaitan kepada pembelaan set off dan jumlah yang patut dibenarkan. Ia tidak memandatkan bahawa pengadil perlu memutuskan dalam cara pihak-pihak mengkehendakinya untuk memutuskan kerana ia akan dilihat sebagai berat sebelah dalam memihak kepada satu pihak sahaja. Di sini, kedua-dua pihak mengambil kedudukan bertentangan sama sekali dan pengadil memberi alasan-alasannya mengapa jumlah RM510,000 adalah berjustifikasi melalui set off. Selepas mendengar kedua-dua pihak, pengadil tidak terikat untuk menerima satu daripada kedua-dua kedudukan tetapi untuk mencapai kepada jumlah yang adil, munasabah dan berjustifikasi dengan mengambil kira kepada peruntukan-peruntukan kontrak (lihat perenggan 27 & 30–31).

(3) Terhadap isu bahawa pengadil telah mengawardkan faedah sehingga 9 November 2016 meskipun tuntutan SQA untuk faedah adalah hanya sehingga 6 Jun 2016, ini adalah sesungguhnya kesilapan dalam pengiraan faedah yang mengakibatkan perbezaan yang tidak kukuh dalam jumlah penghakiman. Kesilapan adalah tidak langsung material untuk menjustifikasikan pengenepian keseluruhan keputusan penghukuman. Pengadil tidak bertindak dengan bermain-main. Ia adalah kesilapan yang tidak menjejaskan inti pati keputusan dan satu yang boleh diperbetulkan di dalam timbang tara atau litigasi. Tidak terdapat pelanggaran keadilan semula jadi. Walaupun terdapat pelanggaran sedemikian, ia hanya bersifat tidak penting dan tidak menjejaskan secara substansial keputusan kes (lihat perenggan 44–50 & 54).

(4) Di bawah Akta, pengadil mempunyai bidang kuasa untuk memutuskan atas bayaran faedah atas jumlah yang dituntut di bawah tuntutan bayaran sama ada atau tidak ia diplidkan. Fakta bahawa pengadil di sini mengira faedah kontraktual sehingga tarikh notis penghukuman 9 November 2016 di mana sepatutnya sehingga 30 September 2016 (tarikh tuntutan bayaran diserahkan) adalah kesilapan dalam bidang kuasa dan bukan kesilapan berlebihan bidang kuasa dan sememangnya tidak menjustifikasikan pengenepian keseluruhan keputusan penghukuman tersebut (lihat perenggan 56 & 60).]

Notes

For cases on building contract in general, see 3(3) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 4158–4448.

Cases referred to

ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal [2016] MLJU 1776, CA (refd)

Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd [2001] 1 All ER (Comm) 1041; [2000] EWCA Civ 507, CA (refd)

Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC), QBD (refd)

Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd and another case [2017] 7 MLJ 732, HC (refd)

Gazzriz Sdn Bhd v Hasrat Gemilang Sdn Bhd [2016] MLJU 1054, HC (refd)

Humes Building Contracts Ltd v Charlotte Homes (Surrey) Ltd [2007] Lexis Citation 9, QBD (refd)

Primus Build Ltd v Pompey Centre Ltd and anor [2009] All ER (D) 14 (Jul); [2009] EWHC 1487 (TCC), QBD (refd)

Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals [2015] MLJU 1873; [2015] 1 LNS 1435, HC (refd)

Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd [2007] 3 SLR 86, CA (refd)

Legislation referred to

Arbitration Act 2005 s 37(1)(b)(ii), 37(2)(b)

Construction Industry Payment and Adjudication Act 2012 ss 6, 12(7), (8), 13(c), 15, 25(o)

Contracts Act 1950 s 75

Rules of Court 2012 O 42 r 12

S Raven (Vishal Kumar and Siti Nuramira with him) (S Ravenesan) for the plaintiff.

Lam Wai Loon (Serene Hiew with him) (Harold & Lam Partnership) for the defendant.

Lee Swee Seng J:

[1] There are two applications by way of originating summons, one filed by SQA Builders Sdn Bhd ('SQA') as the plaintiff against Luxor YRM Sdn Bhd ('Luxor') as the defendant to enforce the adjudication decision made under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') in Originating Summons No WA-24C-64–04 of 2017.

[2] The other is Originating Summons No WA-24C-82–05 of 2017 where Luxor is the plaintiff against SQA as the defendant to set aside the adjudication decision.

[3] For the avoidance of confusion as to who is the plaintiff and defendant the parties shall be referred to as SQA and Luxor and sometimes as they were

referred to in the adjudication as claimant and respondent respectively where appropriate in the context of this judgment.

PROJECT

[4] By a letter of award dated 27 November 2012 ('the LOA'), Luxor had appointed SQA as the contractor for a project known as 'Building Works for Proposed Industrial/Office Development on Lot PT 9922, Jalan Teknologi, Kota Damansara, PJU 5, Daerah Petaling, Selangor Darul Ehsan' for a contract sum of RM10,718,794.54. The standard PAM form of agreement and schedule of conditions of building contract, private edition — 2006 (without quantities) ('PAM contract') was incorporated and forms part of the contract between the parties. The LOA and PAM contract are collectively referred to as the contract.

[5] Disputes arose between the parties. SQA argued that it was entitled to payment for amounts certified under interim payment certificates Nos 25–28 and Luxor contending that it has a right to deduction of accrued liquidated and ascertained damages ('LAD') arising from SQA's delay in completion of the works.

PROCEEDINGS IN ADJUDICATION

[6] SQA served a payment claim on 30 September 2016 on Luxor seeking payment of interim payment certificates Nos 25–28 together with late payment interest at the rate of 7.85% to a total of RM1,058,880.29 and payment of the second moiety of the retention sum in the amount of RM162,624.50. The total amount sought by SQA is RM1,221,504.79.

[7] Luxor in turn served its payment response on SQA on 17 October 2016 acknowledging that payment was due for interim payment certificates Nos 25–28 and the second moiety however highlighting that LAD in the amount of RM527,850 should be deducted from the same. SQA's tabulation of interests in the payment claim was not agreed.

[8] A notice of adjudication was served by SQA on Luxor on 18 October 2016 and in line with CIPAA, an adjudicator was appointed in due course.

[9] SQA served its adjudication claim dated 6 December 2016 ('the adjudication claim'), inter alia, raising the following issues:

(a) no valid payment response has been issued and/or served and as such, no valid defence has been raised by Luxor;

A (b) payment for interim payment certificates Nos 25–28 together with interest at the rate of 7.85% amounting to a total of RM1,058,880.29 was due and owing; and

(c) the second moiety of the retention sum in the amount of RM162,624.50 B was due and owing.

[10] Luxor served its adjudication response dated 21 December 2016, inter alia, raising the following issues:

C (a) the payment response was issued within the time line provided by s 6 of the CIPAA 2012;

(b) the fact that payment of monies are due to SQA is acknowledged but the quantum claimed is in dispute; and

D (c) Luxor is entitled to deduct liquidated damages as provided in the payment response in the amount of RM527,850 by virtue of cl 22 of the PAM contract.

[11] SQA served its adjudication reply dated 29 December 2016, inter alia, E raising the following issues:

(a) there is no valid payment response from Luxor and therefore no right to rely on the defence of set off for liquidated damages; and

F (b) in any event, the LAD claimed by Luxor is based on a superseded certificate of non-completion and is still subject to proof of the loss and damage suffered.

[12] The adjudicator issued her decision on 6 March 2017 ('the original adjudication decision') with a revision to the same on 20 March 2017 ('the G revised adjudication decision') and both decisions shall be referred to collectively as the 'adjudication decision'.

[13] The adjudication decision is as follows:

H IN DETERMINATION

Pursuant to the CIPA Act 2012, I determine that:

(a) The amount to be paid by the Respondent to the Claimant is RM638,446.16 and interest of the sum RM66,640.94 calculated until I 9 November 2016. The total amount of RM705,087.10 is recorded as the adjudicated sum.

(b) ...

(c) ...

(d) The rate of interest payable is 5% simple interest per annum from 10 November 2016 until payment of the adjudicated sum.

[14] Following a written request made by the respondent Luxor in the adjudication on ground of typographical or computational errors made by the adjudicator, the adjudicator in her revised adjudication decision made the following correction the material part of which is in bold and crossed-out is as follows:

IN DETERMINATION

Pursuant to the CIPA Act 2012, I determine that:

(a) The amount to be paid by the Respondent to the Claimant is RM638,446.16 and interest of the sum *RM62,678.92* calculated until 9 November 2016. The total amount of *RM701,125.08* is recorded as the adjudicated sum.

(b) ...

(c) ...

(d) The rate of interest payable is 5% simple interest per annum ~~from 10 November 2016~~ until the payment of the adjudicated sum, *excluding the period between 6 March 2017 and 27 March 2017*. (Emphasis added.)

[15] The adjudicator had also ordered costs of the adjudication proceedings to be borne by Luxor in the amount of RM31,486.60. The adjudicated sum shall be paid to the claimant no later than 27 March 2017.

PRAYERS

[16] The respondent Luxor being aggrieved by the adjudication decision had applied to set it aside under s 15 of the CIPAA on the ground of breach of natural justice and that of excess of jurisdiction.

[17] The grounds set out in the application are as follows:

(1) the adjudicator had breached the rules of natural justice when she recalculated the LAD that Luxor is entitled to set off from SQA's claim without inviting parties to submit on the issue;

(2) the adjudicator had breached the rules of natural justice when she awarded interest up to 9 November 2016 without inviting parties to submit on the issue and notwithstanding SQA's claim for interest only up to 6 June 2016; and

(3) the adjudicator had acted in excess of jurisdiction when she computed interest up to 9 November 2016 when her jurisdiction only stretched to 30 September 2016, ie the date the payment claim was served.

PRINCIPLES

[18] Section 15 of the CIPAA under which the plaintiff has made this application to set aside the adjudication decision reads as follows:

> An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:
>
> (a) The adjudication decision was improperly procured through fraud or bribery;
>
> (b) *There has been a denial of natural justice;*
>
> (c) The adjudicator has not acted independently or impartially, or
>
> (d) *The adjudicator has acted in excess of his jurisdiction*. (Emphasis added.)

WHETHER THE ADJUDICATOR IS IN BREACH OF THE RULES OF NATURAL JUSTICE IN CALCULATING OR RECALCULATING THE LAD THAT THE RESPONDENT IS ENTITLED TO SET OFF FROM THE CLAIMANT'S CLAIM

[19] As it is not very clear what was meant by 'recalculating' the LAD claimed, I shall consider it both from the perspective of the adjudicator arriving at an amount of LAD different from the amount claimed by Luxor by way of a set off as well as the recalculated sum following the request for correction by Luxor leading to a revised adjudication decision.

[20] The powers of an adjudicator to make corrections of his decision is confined to computational or typographical error under s 12(7) of the CIPAA which reads:

> The adjudicator may at any time correct any computational or typographical error on the adjudicator's own initiative or at the request of any party.

[21] Section 12(8) further provides that any correction made is deemed to take effect from the date of the original adjudication decision. The respondent through its learned counsel, contended that the adjudicator is not entitled to recalculate the LAD otherwise than to calculate based on the sum of RM2,550 per day as contractually agreed in cl 9(c)(ii) of the LOA for Lot 3 for the 207 days of delay from the new completion date of 27 November 2014 to date of certificate of practical completion on 25 June 2015. That according to the respondent works out to RM527,850. The respondent was not happy that the adjudicator had only allowed RM510,000 as can be seen in the calculation at

Appendix A to the adjudication decision. A

[22] Apparently the adjudicator had not allowed the said sum claimed on the following grounds stated at item 30 of her adjudication decision as follows:

> 30. I disagree to the calculation for Liquidated Damages and interest provided by the Respondent for the following reasons: B
>
> i. The Liquidated Damages in this case could only be imposed with the two conditions mentioned in Item 13 above being fulfilled;
>
> ii. Interest applied on the outstanding sum prior to the same conditions being fulfilled is calculated up to 14 September 2015, the day before the issuance of the Respondent letter as stated in item 19 of this section. C
>
> iii. Interest applied on the outstanding sum after the same conditions being fulfilled is calculated up to 9 November 2016, the day before the Claimant lodge the request to appoint adjudicator. D

[23] In item 13 the adjudicator stated as follows:

> Pursuant to Clause 22 of the PAM conditions of contract, the Respondent is entitled to deduct Liquidated Damages from the payment owing to the Claimant with the conditions that Certification of Non-Completion is issued to the Claimant and the Respondent informs the Contractor in writing of such deduction. E

[24] As the issue of how much of the set off in the nature of an LAD claim was before the adjudicator, there was no need for her to disclose to the parties that she would allow part of it and to ask the parties for further submission as to whether it was proper for her to go down that path. F

[25] Learned counsel for the respondent had cited the case of *Humes Building Contracts Ltd v Charlotte Homes (Surrey) Ltd* [2007] Lexis Citation 9, HHJ Gilliland QC sitting at the TCC in Salford made the following remarks at para 20 of his judgment as follows: G

> The Adjudicator during the Adjudication did not raise the point with the parties and it is clear that the *defendant did not have any opportunity to make submissions* to the Adjudicator on his rejection or proposed rejection of the defendant's claims for defects and liquidated damages. If a court had acted in this way and *decided issues on a ground which had not been raised before it and where the parties had not been given an opportunity to make submissions* on the point, there is little doubt but that the Decision would be open to challenge on the grounds of breach of natural justice. (Emphasis added.) H I

[26] The above proposition must be confined to cases where an adjudicator decides on issues not raised properly before him.

[27] I cannot comprehend how the adjudicator can be said to have breached the rules of natural justice when both parties have taken diametrically opposite positions and the adjudicator has given his reasons why the sum of RM510,000 is a justified claim by the respondent by way of a set off.

[28] The adjudicator had dismissed the objection raised by the claimant that the original payment response has named the respondent as Luxor Holdings Sdn Bhd instead of Luxor YRM Sdn Bhd and thus no valid payment response was filed within time by the right respondent. There was a related project involving Lot 1 where the respondent there was Luxor Holdings Sdn Bhd and that was how the typographical had crept in with no prejudice to the parties as in their submissions the correct name of the respondent has been referred to. Further that it was an error that the claimant had also inadvertently fell into when they had addressed to Luxor Holdings Sdn Bhd for the release of outstanding payment for the works for Lot 3. The adjudicator allowed an amendment to the original payment response where the incorrectly spelled name of the respondent was concerned.

[29] The adjudicator at item 18 of the adjudication decision rejected the claimant's contention that there is no valid certificate of non-completion because the certificate of non-completion had been revoked by the certificate of extension of time as been unsubstantiated. The adjudicator further went on to find as a matter of fact that certificate of non-completion No 3 was not revoked by any subsequent certificate of extension of time and it remains valid.

[30] The claimant had also raised the fact that under s 75 of the Contracts Act 1950 the respondent's claim of a set off arising out of the LAD is subject to proof. Surely after hearing both parties on what should be the proper amount of set off arising out of the LAD claimed, the adjudicator is not bound to accept one of both positions but to arrive at a fair, reasonable and justified amount having regard to the provisions in the contract. The net result was that Luxor was required to pay SQA the adjudicated sum of RM638,446.16 (excluding interest and cost).

[31] All that the rules of natural justice require of an adjudicator is that both sides be heard on an issue or matter in dispute. Here it is with respect to the defence of set off and the amount that should be allowed. It does not mandate the adjudicator to decide in a particular manner as the parties would want the adjudicator to decide. That would be a breach of natural justice as he would be seen to be bias in favour of one side as against the other. The adjudicator is not obliged to give a decision in accordance with what a party is passionately and polemically convinced of his position in fact and law.

[32] In *Gazzriz Sdn Bhd v Hasrat Gemilang Sdn Bhd* [2016] MLJU 1054

this court has occasion to observe as follows:

> [45] It cannot be overstated that the unsuccessful party in an adjudication must not simply raise the ground of breach of natural justice in setting aside an adjudication award just because that party now disagrees with the interpretation of law or finding of facts based on the evidence or both. The ground of breach of natural justice should not be used as a backdoor way to set aside an adjudication decision made after both parties have been given the opportunity to submit their payment claim and payment response and followed by adjudication claim and adjudication response and if need be an adjudication reply after that. A respondent who does not avail itself of the opportunity to file the payment response and adjudication response cannot be heard to shout and scream that there had been a breach of natural justice. It is singularly devoid of merits and will not be entertained by the courts.
>
> [46] I recall the Singapore case of *Am Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260, and the dicta Judith Prakash J, in a context not dissimilar to ours:
>
> > [23] There are two rules of natural justice: the first is that a man should not be the judge in his own cause and the second is that the judge or Adjudicator or other arbiter must hear both side of the dispute. The second rule is often referred to by its Latin tag, audi alteram partem. Laguna's submission, while not specifically identifying which rule of natural justice had been breached, appeared to refer to the second one.
> >
> > [24] Laguna submitted that the Adjudicator had failed to comply with the rules of natural justice in that in coming to the Adjudication Determination, he had failed to take into consideration and/or give proper weight to materials tendered by AMA which showed a discrepancy in AMA's claim, in particular, its claim that the Concept Design had been approved. Its submissions went into the evidence in order to establish the alleged discrepancy and it then argued that if the Adjudicator had given proper consideration and weight to such discrepancy and had taken into consideration the relevant evidence tendered by the parties, he would have held that all payment claim made by AMA had been made prematurely.
> >
> > [25] Although the paragraph above contains only a brief summary of Laguna's contentions, it can be gathered from such summary that what Laguna was complaining about was not really a failure on the part of the Adjudicator to hear both sides of the dispute but a failure on his part to decide the dispute as Laguna considered it should be decided. The audi alteram partem rule required the Adjudicator to receive both parties submissions and consider them; it did not require him to decide the dispute in accordance with Laguna's submissions. It was clear from the Adjudication Determination that the Adjudicator had conducted the adjudication in accordance with the principles of natural justice: he had called an adjudication conference at which both parties were able to make their submissions, an opportunity which Laguna had availed itself of. Thereafter, as the Adjudication Determination itself made plain, the Adjudicator gave consideration to all points raised and he then came to certain conclusions for which he gave his reasons. *However dissatisfied Laguna may be with those decisions,*

it cannot ask for the Adjudication Determination to be set aside because it considers the decisions to be against the weight of the evidence.

[26] *The principles of natural justice are concerned with the provision of a fair hearing to contending parties. They do not mandate any particular result. As long as the parties have been given a fair hearing, the decision cannot be set aside for failure to comply with natural justice. A party who is dissatisfied with the decision on its merits cannot use the principles of natural justice to have the decision set aside ...* (Emphasis added.)

[47] That 'error' if there be will have to be corrected at arbitration or litigation as the adjudication decision is only of interim finality and will be overtaken by the fully final arbitral award or litigation judgment. However to this day the respondent has not proceeded with any arbitration or litigation to correct the so-called error or wrong decision. (Emphasis added.)

[33] One may be permitted to draw an analogy from the ground of a breach of natural justice for setting aside an arbitral award under our s 37(1)(b)(ii) and 37(2)(b) of the Arbitration Act 2005. The requirement of natural justice is that there should be procedural fairness in the way the adjudicator conducts the proceedings before him. This ground of setting aside, be it an arbitral award or adjudication decision would not bite unless the most basic notion of morality and justice is offended.

[34] The case of *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR 86, a decision of the Singapore Court of Appeal, is both instructive and illustrative, at p 119:

It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute. They may expect the arbitrator to select one of these alternative positions. The arbitrators, however, is not bound to adopt an either/or approach. He is perfectly entitled to embrace a middle path (even without appraising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him. Similarly, an arbitrator is entitled — indeed, it is his obligation, to come to his own conclusions or inferences from the primary facts placed before him. In this context, *he is not expected to inexorably accept the conclusions being urged upon him by parties, neither is he expected to consult the parties on his thinking process before finalizing the award unless it involves a dramatic departure from what has been presented to him.*

Each case should be decided within its own factual matrix. It must always be borne in mind that it is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather an award should be read generously such that *only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied.* (Emphasis added.)

[35] What is true of the ground of a breach of natural justice for setting aside

an arbitral award would apply with even greater force to an adjudication decision as by its very nature, it is only provisional and having only interim finality under s 13(c) of the CIPAA 'unless the dispute is finally decided by arbitration or the court'.

[36] The analysis of the cases by Justice Cookson J in *Primus Build Ltd v Pompey Centre Ltd and anor* [2009] All ER (D) 14 (Jul); [2009] EWHC 1487 (TCC) is relevant for our consideration:

> [29] Generally speaking, the rules of natural justice apply to adjudication, but they cannot always be fully applied, given the short timetable and 'the crude methodology' sometimes involved: see *Balfour Beatty Construction Ltd v London Borough of Lambeth* [2002] EWHC 597. Any alleged breach must be examined critically (*Amec Capital Projects Ltd v Whitefriars City Estates Ltd* [2005] BLR 1) and must be material or of significance to the decision actually made by the adjudicator: see *Kier Regional Ltd (t/a Wallis) v City & General (Holborn) Ltd* [2006] EWHC 848 TCC and *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 TCC. In other words, *if there has been a breach of natural justice, but it cannot be demonstrated that it goes to the heart of the adjudicator's decision, it will not affect the enforcement of that decision.*
>
> [30] There are a number of reported cases in which an adjudicator's decision has not been enforced, because it relied heavily on something which had not come from either of the parties but from the adjudicator himself, in circumstances where the parties had not even had the opportunity to comment on this new approach. Thus, in *Balfour Beatty Construction Ltd v London Borough of Lambeth* the adjudicator, with the help of his own programming expert, provided a critical path analysis which then formed the basis of his decision, even though that analysis was not shared with the parties and was not even seen by them until the decision was published. HHJ Lloyd QC held that, in consequence, there had been a breach of natural justice and the adjudicator's decision was invalid.
>
> [31] Similarly, in *RSL (South West) Ltd v Stansell Ltd* [2003] EWHC 1390 (TCC), the adjudicator relied on an independent report, again without notification to the parties. HHJ Seymour QC said that, whilst the adjudicator was entitled to obtain such a report, he should not have had any regard to it without giving both parties the chance to consider the contents of that report and to comment upon it. He also found that the breach was plainly material because the adjudicator had relied on the report in coming to his decision.
>
> [32] However, this issue will always be a matter of fact and degree. So, in *Multiplex Constructions (UK) Ltd v West India Quay Development Company (Eastern) Ltd* [2006] EWHC 1569 TCC, Ramsey J worked through the various aspects of an adjudicator's decision which, so it was said, the parties had not had an opportunity to comment upon. He concluded that, unlike the adjudicator in *Balfour Beatty*, the adjudicator had not adopted his own methodology, but had instead carefully assessed the contractor's own programming analysis and made due allowance for his concerns about various aspects of it. There was, therefore, *no breach of the rules of natural justice, because the adjudicator's decision was based upon the material properly before him, on which both parties were seeking to rely.*

...

[40] As I have said, these things are always a matter of fact and degree. *An adjudicator cannot, and is not required to, consult the parties on every element of his thinking leading up to a decision, even if some elements of his reasoning may be derived from, rather than expressly set out in, the parties' submissions*. But where, as here, an adjudicator considers that the referring party's claims as made cannot be sustained, yet he himself identifies a possible alternative way in which a claim of some sort could be advanced, he will normally be obliged to raise that point with the parties in advance of his decision. It seems to me that that principle must apply *a fortiori* in circumstances where the document from which the alternative approach is to be derived, is a document which the adjudicator was told by the parties to ignore. In those circumstances, common sense demands that, before reaching any conclusion, the adjudicator must ask the parties for their submissions on that alternative approach. (Emphasis added.)

[37] As to the recalculation of interest by the adjudicator, the revision to the adjudication decision was done at the request of Luxor. Luxor had contended more than conceded that there were computational errors that may require the adjudicator to revise its decision on the interests and if one may compare the Appendix A setting out the calculation of interest in both the original adjudication decision and the revised adjudication decision, one would see that the computational errors have arisen only in the 'Interest Calculation as at 9/11/2016' column with the result that the interest should be only RM62,678.92 yielding an adjudicated sum of RM701,125.08 instead of interest of RM66,640.94 giving an adjudicated sum of RM705,087.10.

[38] Having requested for the correction of the computational errors and the errors having been corrected in favour of the respondent, it is hardly a ground for complaint by the respondent on a breach of natural justice.

[39] Therefore whether it was a calculation of the amount of LAD or a recalculation of the LAD with respect to the interest on the amount to be set off from the claimant's claim, it was a decision that the adjudicator had made after hearing both sides and having regard to the documents submitted before her and certainly cannot be said to be in breach of natural justice.

WHETHER THE ADJUDICATOR HAD BREACHED THE RULES OF NATURAL JUSTICE WHEN SHE AWARDED INTEREST UP TO 9 NOVEMBER 2016 WITHOUT INVITING PARTIES TO SUBMIT ON THE ISSUE AND NOTWITHSTANDING THE CLAIMANT'S CLAIM FOR INTEREST ONLY UP TO 6 JUNE 2016

[40] The learned adjudicator is entitled to interpret the terms of the contract, peruse the document submitted by both parties and decide on the calculation of claim or LAD. It is for the adjudicator to deal with how the

adjudication proceedings are to proceed. See the case of *Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals* [2015] MLJU 1873; [2015] 1 LNS 1435.

[41] In *ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal* [2016] MLJU 1776 the Court of Appeal laid down the principles with regard to an allegation of breach of natural justice in the context of CIPAA. The Court of Appeal at para 19 held that 'when one speaks of natural justice, it is nothing more than what we call the concept of 'procedural fairness' which needs to be accorded to the parties in dispute of a hearing'.

[42] Under s 25(o) of the CIPAA, an adjudicator has broad powers to award financing costs and interest. The respondent submitted that the adjudicator is still duty bound to determine this issue based on what has been submitted to her and not to conjure interest time frames based on her own perceptions and in isolation from the parties.

[43] By the same token I would say that even if no interest has been prayed for the adjudicator in exercising her vast powers under s 25(o) of the CIPAA would be at liberty to grant interest from the period that she deems fair and reasonable having regard to the contractual provisions of the contract. When one looks at Form 1 Payment Claim under the KLRCA Adjudication Rules and Procedures there is no specific plea of interest and the period from which it is to run.

[44] It is true that the adjudicator had awarded contractual interest up to 9 November 2016 as evident from para 30(iii) of the adjudication decision being the day before the claimant lodged the request to appoint an adjudicator, whilst the interest claimed by SQA was only up to 6 June 2016.

[45] Contractual interest was at the rate of 7.85%pa whereas simple interest at 5%pa was to run from 10 November 2016 until the payment of the adjudicated sum.

[46] One can thus see that the difference if at all is the difference between 7.85% and 5% which is 2.85% for the period between 6 June–9 November 2016 for if she had awarded contractual interest up to 6 June 2016 as contended, then she would have awarded simple interest running from 7 June 2016 instead of from 10 November 2016. Correspondingly interest on the set off amount was also correspondingly calculated till 9 November 2016 and any excess in interest is more or less even out.

[47] Looking at the big picture, that is at most an error in calculation and not so much a breach of natural justice.

[48] This is not so much a case where the adjudicator had gone on a frolic of her own but that in her anxiety to get the calculation precisely correct, she had forgotten for a moment that the claimant had only claim interest until 6 June 2016. Moreover the claimant had pleaded for interest at any rate and for such period that the adjudicator may determine at para 25 of its adjudication claim, thus giving a broad discretion to the adjudicator where the calculation of interest is concerned.

[49] It is at the end of the day an error in calculation of interest and not a material one that justifies the setting aside of the whole of the adjudication decision. It is an error that can be corrected in arbitration or litigation. It does not affect the substance of the decision.

[50] If it is a breach of natural justice it is only of a peripheral nature and does not affect substantially the outcome of the case.

[51] I agree with learned counsel for Luxor that the rules on breach of natural justice have been succinctly set out in the case of *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC) where the court held at para 57 of the judgment:

> From this and other cases, I conclude as follows in relation to breaches of natural justice in Adjudication cases:
>
> (a) It must first be established that the Adjudicator failed to apply the rules of natural justice;
>
> (b) *Any breach of the rules must be more than peripheral; they must be material breaches*;
>
> (c) Breaches of the rules will be material in cases where the *Adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment* upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant.
>
> (d) *Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any judge in a case such as this*.
>
> (e) It is only if the *Adjudicator goes off on a frolic of his own*, that *is wishing to decide a case* upon a factual or *legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment* or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of *Balfour Beatty Construction Company Ltd v The Camden Borough of Lambeth* was concerned comes into play. (Emphasis added.)

[52] The above approach was followed in *Econpile (M) Sdn Bhd v IRDK*

Ventures Sdn Bhd and another case [2017] 7 MLJ 732 at para [90].

[53] In an even more glaring computational mistake in calculating the amount outstanding in the English Court of Appeal case of *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2001] 1 All ER (Comm) 1041; [2000] EWCA Civ 507 the Court of Appeal held that the decision of the adjudicator was enforceable. Lord Justice Buxton outlines the brief facts and held as follows:

> 9. Mr Gard [the Adjudicator] then took three further steps. First he deducted from the £7,240,000 a sum of £647,000 that he awarded to Bouygues in respect of damages arising out of the termination, and he expressed the result in his award as the 'contract sum minus deductions' of £6,593,000, again stated to be 'gross'. Second, he deducted from that revised 'contract sum' the amount actually paid by Bouygues under the sub-contract of £6,772,000, to produce a balance in favour of Bouygues of £179,000, stated to be gross. Third, he then added back to the earlier contract sum of £7,240,000 an award of £387,000 that he had made to Dahl-Jensen in respect of additional works performed by Dahl-Jensen and claims for damages sustained by them while the contract was subsisting. That addition increased the gross 'contract sum minus deductions' due to Dahl-Jensen from the figure stated above of £6,593,000 to £6,979,000. *That in turn altered the overall calculation from the balance in favour of Bouygues of £179,000 to a balance in favour of Dahl-Jensen of, in round terms, £208,000. Mr Gard's award was therefore that Bouygues should pay that sum of £208,000 to Dahl-Jensen.*
>
> ...
>
> [14] ... What went wrong was that in making the calculations to answer the question of whether the payments so far made under the sub-contract represented an overpayment or an underpayment, he overlooked the fact that that assessment should be based on the contract sum presently due for payment, that is the contract sum less the retention, rather than on the gross contract sum. That was an error, but an error made when he was acting within his jurisdiction. Provided that the Adjudicator acts within that jurisdiction his award stands and is enforceable. (Emphasis added.)

[54] I would thus conclude that there is no breach of natural justice as in the adjudicator having gone on a frolic of her own and that even if there is a breach of natural justice it is not material enough for this court to intervene in a setting aside having regard to the insubstantial difference in the adjudicated sum that may easily be corrected in arbitration or litigation.

A WHETHER THE ADJUDICATOR HAD ACTED IN EXCESS OF JURISDICTION WHEN SHE COMPUTED INTEREST UP TO 9 NOVEMBER 2016 WHEN THE CLAIMANT HAD ONLY CLAIMED INTEREST UP TO 30 SEPTEMBER 2016, IE THE DATE THE PAYMENT CLAIM WAS SERVED

B

[55] The adjudicator certainly has the jurisdiction to decide on interest payable on the sum claimed under a payment claim whether or not it is pleaded. When it is so pleaded, the adjudicator would certainly have jurisdiction to decide.

C

[56] In this case the adjudicator has jurisdiction to decide on the interest payable and the fact that she had calculated the contractual interest up to the date of notice of adjudication of 9 November 2016 instead of up to 30 September 2016 the date the payment claim was served, is at best an error within jurisdiction and not an error of excess of jurisdiction.

D

[57] Even if the element of interest had not been raised in the payment claim, the adjudicator would have acted within jurisdiction if she had awarded interest under her vast powers under s 25(o) of the CIPAA. When it has been raised, I would say that ordinarily an adjudicator would not grant interest more that what was claimed with respect to when the interest should end but he would not have exceeded his jurisdiction if he had granted contractual interest for a period in excess of the period claimed because as a matter of prudence as well as practice interest is always granted until the adjudicated sum is paid and so if at all there is any difference, it would be the difference between contractual interest and the general default interest of 5%pa that a court of law would give under O 42 r 12 of the Rules of Court 2012 read together with the Practice Direction of the Chief Justice No 1 of 2012 effective from 1 August 2012.

E

F

G

[58] The dicta of Lord Justice Chadwick would ring true in *Bouygues* case as follows:

> [22] Section 108(1) of the Housing Grant, Construction and Regeneration Act 1996 confers on a party to a construction contract the right to refer a dispute arising under the contract for adjudication under a procedure complying with that section. Section 108(3) is in these terms:
>
> > (3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.
>
> [23] It is not in dispute that the contract in the present case is a construction contract for the purposes of section 108 of the 1996 Act. Nor is it in dispute that the parties, as they were entitled to do, referred disputes which had arisen between them

H

I

under that contract to an adjudicator. They did so not under the terms of the contract itself, nor under the terms of the statutory scheme contained in Statutory Instrument 1998 649, but under the Model Adjudication Procedure, Second Edition, published by the Construction Industry Council.

[24] Paragraph 4 of the Model Adjudication Procedure reflects the provisions of section 108(3) of the Act. Paragraph 5 provides that:

> 5. The Parties shall implement the Adjudicator's decision without delay whether or not the dispute is to be referred to legal proceedings or arbitration.

[25] Paragraphs 30 and 31 are in these terms:

> [30] The Parties shall be entitled to the redress set out in the decision and to seek summary enforcement, whether or not the dispute is to be finally determined by legal proceedings or arbitration. No issue decided by the Adjudicator may subsequently be referred for decision by another adjudicator unless so agreed by the Parties.
>
> [31] In the event that the dispute is referred to legal proceedings or arbitration, the Adjudicator's decision shall not inhibit the right of the court or arbitrator to determine the Parties' rights or obligations as if no adjudication had taken place.

[26] The purpose of those provisions is not in doubt. They are to provide a speedy method by which disputes under construction contracts can be resolved on a provisional basis. The adjudicator's decision, although not finally determinative, may give rise to an immediate payment obligation. That obligation can be enforced by the courts. But the adjudicator's determination is capable of being reopened in subsequent proceedings. It may be looked upon as a method of providing a summary procedure for the enforcement of payment provisionally due under a construction contract.

[27] The first question raised by this appeal is whether the adjudicator's determination in the present case is binding on the parties — subject always to the limitation contained in section 108(3) and in paragraphs 4 and 31 of the Model Adjudication Procedure to which I have referred. *The answer to that question turns on whether the adjudicator confined himself to a determination of the issues that were put before him by the parties. If he did so, then the parties are bound by his determination, notwithstanding that he may have fallen into error.* As Knox J put it in *Nikko Hotels (UK) Ltd v MEPC PLC* [1991] 2 EGLR 103 at page 108, letter B, in the passage cited by Buxton LJ, *if the adjudicator has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity.*

[28] I am satisfied, for the reasons given by Buxton LJ, that in the present case the adjudicator did confine himself to the determination of the issues put to him. This is not a case in which he can be said to have answered the wrong question. He answered the right question. *But, as is accepted by both parties, he answered that question in the wrong way. That being so, notwithstanding that he appears to have made an error that is manifest on the face of his calculations, it is accepted that, subject to the limitation to which I have already referred, his determination is binding upon the parties.* (Emphasis added.)

[59] The adjudicator had asked herself the right question on the amount interest she should give and at most she arrived at the wrong answer in allowing contractual interest until 9 November 2016 instead of 30 June 2016 and that is no justification for setting aside the adjudication decision.

[60] I would say, with the greatest of respect to learned counsel for the respondent, that the matter of interest was a matter within the jurisdiction of the adjudicator and the fact that she had granted it more than what was claimed for the period in which contractual interest should end and general interest takes over, is a matter within her discretion. At most, it is an error within jurisdiction and not in excess of jurisdiction, and certainly does not justify a setting aside of the whole of the decision.

PRONOUNCEMENT

[61] The application to set aside the adjudication decision was thus dismissed. Correspondingly the enforcement of the adjudication decision by SQA the claimant was allowed and as both applications were heard together I had ordered a single costs of RM5,000 to be paid by Luxor to SQA.

Order accordingly.

Reported by Ashok Kumar